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No. 07-1182

FILED
JUN 11 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the

Supreme Court of the United States

MICHIGAN CIVIL RIGHTS INITIATIVE COMMITTEE and AMERICAN CIVIL RIGHTS FOUNDATION,
Petitioners,

v.

COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRANT RIGHTS AND TO FIGHT FOR EQUALITY BY ANY MEANS NECESSARY, et al.,
Plaintiffs and Respondents,

and

JENNIFER GRANHOLM, et al.,
Defendants and Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Should the Court abandon the settled four-element inquiry under Rule 24(a)(2) of the Federal Rules of Civil Procedure, substituting a *per se* rule that ballot-initiative sponsors *always* have a right to intervene in litigation challenging measures enacted with their support because state governments, as a matter of law, are categorically disqualified from mounting an adequate defense of such measures?

TABLE OF CONTENTS

Page

COUNTERSTATEMENT OF THE QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

BRIEF IN OPPOSITION 1

COUNTERSTATEMENT OF THE CASE 2

REASONS FOR DENYING THE PETITION 3

I. The Decision Below Is Consistent With Well-Settled Law and Reflects the Sound Policy Judgments Embodied in Rule 24(a)(2). 4

II. Petitioners' Proposed Per Se Rule Would Conflate the Elements of the Rule 24(a)(2) Analysis, Ignore the Reality that State Governments Can Competently Defend Their Own Laws, and Eviscerate the Discretion of the District Courts. 7

III. The "Direct and Dramatic" Inter-Circuit Conflict Petitioners Claim to Identify Does Not Exist 12

CONCLUSION 15

TABLE OF AUTHORITIES

Page(s)

CASES

Arizonans for Official English v. Arizona, 520 U.S. 43 (1997) 5

Coalition to Defend Affirmative Action v. Granholm, 240 F.R.D. 368 (E.D. Mich. 2006)..... 2, 12

Coalition to Defend Affirmative Action v. Granholm, 501 F.3d 775 (6th Cir. 2007) .....passim

Coalition to Defend Affirmative Action v. Granholm, 539 F. Supp. 2d 924 (2008)..... 9

Diamond v. Charles, 476 U.S. 54 (1986)..... 6

FM Properties Operating Co. v. City of Austin, 71 F.3d 879, 1995 WL 727288 (5th Cir. 1995)..... 4

Forest Conservation Council v. U.S. Forest Serv., 66 F.3d 1489 (9th Cir. 1995)..... 13, 14

Idaho v. Freeman, 625 F.2d 886 (9th Cir. 1980)..... 14

Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp., 510 U.S. 27 (1993) 1, 7, 8

Jenkins v. Missouri, 78 F.3d 1270 (8th Cir. 1996)..... 9

Page(s)

Keith v. Daley, 764 F.2d 1265 (7th Cir. 1985)..... 4, 5

League of Latin American Citizens v. Wilson, 131 F.3d 1297 (9th Cir. 1997)..... 11, 14

Mich. State AFL-CIO v. Miller, 103 F.3d 1240 (6th Cir. 1997)..... 12

Mo.-Kan. Pipe Line Co. v. United States, 312 U.S. 502 (1941) 1

Northland Family Planning Clinic, Inc. v. Cox, 487 F.3d 323 (6th Cir. 2007) 4, 6, 12

Northwest Forest Resource Council v. Glickman, 82 F.3d 825 (9th Cir. 1996) 9

Prete v. Bradbury, 438 F.3d 949 (9th Cir. 2006)..... 4, 14

Providence Baptist Church v. Hillandale Comm., Ltd., 425 F.3d 309 (6th Cir. 2005)..... 6

Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525 (9th Cir. 1983)..... 10, 11, 13

Standing Together to Oppose Partial-Birth-Abortion v. Northland Family Planning Clinic, Inc., 128 S. Ct. 872 (2008) 6

United States v. Michigan, 424 F.3d 438 (6th Cir. 2005)..... 4

Page(s)

Washington State Building & Construction Trades Council v. Spellman, 684 F.2d 627 (9th Cir. 1982) 13

Wisniewski v. United States, 353 U.S. 901 (1957) 14

STATUTES & RULES

Fed. R. Civ. P. 24(a)(2) ..... passim

Fed. R. Civ. P. 59 3

Mich. Comp. Laws § 14.28 8

OTHER AUTHORITIES

7A C. Wright & A. Miller, Federal Practice and Procedure § 1904 (1972) 13

Mich. Const. Art. 2, § 9 11

BRIEF IN OPPOSITION

The petition seeks review of a decision that is consistent with settled law, supported by robust policy considerations, and of a sort this Court has long recognized to be rarely appropriate for discretionary review.[1] *See Mo.-Kan. Pipe Line Co. v. United States*, 312 U.S. 502, 506 (1941) ("[T]he circumstances under which interested outsiders should be allowed to become participants in a litigation [are], barring very special circumstances, a matter for the [trial] court"); *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 33-34 (1993) (per curiam) (noting that "[w]hile the decision on any particular motion to intervene may be a difficult one, it is always to some extent bound up in the facts of the particular case" and that "addressing a relatively factbound issue . . . does not meet the standards that guide the exercise of our certiorari jurisdiction").

For these reasons, set forth more fully below, Respondents Chase Cantrell, *et al.* (the "Cantrell Plaintiffs") request that the Court deny the petition for a writ of *certiorari* to review the opinion of the Court of Appeals for the Sixth Circuit reported at 501 F.3d 775.

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[1] The Cantrell Plaintiffs file this brief at the Court's request; believing the petition to be without merit, they initially waived their right to file an opposition brief.

COUNTERSTATEMENT OF THE CASE

The underlying litigation is a constitutional challenge to Michigan's ban on affirmative action ("Proposal 2"), enacted in November 2006 through the state's ballot initiative process. Plaintiffs are two, separate putative classes that include students, prospective students and faculty at Michigan's public universities.[2] The original named defendants were the Governor of Michigan and each of Michigan's three public universities.

Shortly after the complaint was filed, Michigan Attorney General Michael A. Cox was granted leave to intervene as a defendant in light of his statutory duty to defend the state's laws from constitutional challenge and his strong support for Proposal 2. *See Coalition to Defend Affirmative Action v. Granholm*, 240 F.R.D. 368, 371 (E.D. Mich. 2006). The district court also permitted the intervention of a white male Michigan resident who sought to protect his interest in having his then-pending law school application decided with Proposal 2 in effect. The district court denied motions to intervene by the ballot-question committee that sponsored Proposal 2 (the Michigan Civil Rights Initiative Committee ("MCRIC")), and two other political organizations (the American Civil Rights Foundation ("ACRF") and Toward a Fair Michigan ("TAFM")). *Id.* On September 6, 2007, the Court of Appeals affirmed the district court's denial of intervention with respect to each of those

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[2] These two groups, represented by separate counsel, are referred to as the "Coalition Plaintiffs" and the "Cantrell Plaintiffs".

organizations, holding that they "lack[ed] a substantial legal interest in the outcome of this case." *Coalition to Defend Affirmative Action v. Granholm*, 501 F.3d 775, 783 (6th Cir. 2007). MCRIC and ACRF ("Petitioners") unsuccessfully sought *en banc* review, and now petition this Court for a writ of *certiorari*.

Governor Granholm was dismissed from this action on September 5, 2007. The remaining parties have conducted thorough discovery, followed by dispositive motion practice. On March 18, 2008, the district court granted Attorney General Cox's motion for summary judgment and dismissed both the Cantrell and Coalition Plaintiffs' claims. A motion by the Cantrell Plaintiffs to alter or amend the judgment pursuant to Rule 59 of the Federal Rules of Civil Procedure was timely filed with the District Court on April 1, 2008, and is currently pending.

REASONS FOR DENYING THE PETITION

The petition should be denied because the decision below reflects the proper application of well-settled law. Moreover, the petition seeks the wholesale replacement of the intervention inquiry under Rule 24(a)(2) of the Federal Rules of Civil Procedure and invites this Court to create an unnecessary and counterproductive *per se* rule – that states can never adequately defend ballot-enacted legislation – which is repulsive to both the dignity of state governments and the sound discretion of the district courts.

I. The Decision Below Is Consistent With Well-Settled Law and Reflects the Sound Policy Judgments Embodied in Rule 24(a)(2).

The rule in every circuit – as Petitioners do not dispute – is that a proposed intervenor must establish four conditions in order to obtain intervention as of right under Rule 24(a)(2): (1) that the motion to intervene is timely; (2) that the proposed intervenor has a substantial legal interest in the subject matter of the case; (3) that the proposed intervenor's ability to protect that interest may be impaired in the absence of intervention; and (4) that the parties already before the court may not adequately represent the proposed intervenor's interest. *United States v. Michigan*, 424 F.3d 438, 443 (6th Cir. 2005); *see also, e.g., Prete v. Bradbury*, 438 F.3d 949, 954 (9th Cir. 2006); *Keith v. Daley*, 764 F.2d 1265, 1268 (7th Cir. 1985).

Courts have held repeatedly that an advocacy group that employs an initiative process to secure enactment of a new law lacks a cognizable interest entitling it to intervene as of right in subsequent litigation challenging such an enactment's validity – unless the group itself is regulated by the law. *Coalition*, 501 F.3d 775; *Northland Family Planning Clinic, Inc. v. Cox*, 487 F.3d 323 (6th Cir. 2007); *see also FM Properties Operating Co. v. City of Austin*, 71 F.3d 879, 1995 WL 727288, at *2 (5th Cir. 1995) (unpublished table disposition) (affirming denial of intervention by conservation organization notwithstanding its argument "that as the representative of the sponsor of the ballot initiative [whose application was at issue], it had a *per se* right

to intervene"); *Keith*, 764 F.2d at 1270 (affirming denial of intervention by pro-life advocacy group, explaining that such a group was not entitled "to forever defend statutes it helped enact").[3]

The opinion below is firmly grounded in that precedent. It is also consistent with this Court's skepticism respecting ballot initiative sponsors' purported "quasi-legislative interest in defending the constitutionality of the measure they successfully sponsored." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 65-66 (1997) (vacating judgment appealed from on other grounds, but adverting to "grave doubts" as to whether ballot initiative sponsors had standing to pursue an appeal in view of the fact that "this Court has [n]ever identified initiative proponents as Article-III-qualified defenders of the measures they advocated").

Specifically the Sixth Circuit in the instant case explained that Petitioners "have only a general ideological interest in seeing that Michigan enforces Proposal 2", noted that "neither the MCRI[C] nor the ACRF maintains that it or its members are specifically regulated by those portions of Michigan's constitution amended by Proposal 2" and held that "[a]n interest so generalized will not support a claim

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[3] As discussed more fully *infra* at Section III, the "direct and dramatic" circuit split Petitioners claim to identify with respect to this issue (Pet. at 17) rests entirely on a single paragraph, arguably *dicta*, in one case from the Ninth Circuit.

for intervention as of right." 501 F.3d at 782 (internal quotation marks omitted).[4]

This settled rule is supported by sound policy. There are compelling reasons not to enact a presumptive right for ballot sponsors to intervene in litigation challenging measures whose enactment they supported. Most fundamentally, our political system allocates to the *state* primary responsibility for defense and enforcement of the law. *Northland*, 487 F.3d at 345 ("[T]he public interest in [an enacted measure's] enforceability is entrusted for the most part to the government."); *Diamond v. Charles*, 476 U.S. 54, 65 (1986) (explaining that "the power to create and enforce a legal code, both civil and criminal[,] is one of the quintessential functions of a State" and that only the State has a "direct stake . . . in defending the standards embodied in that code") (internal citations and quotation marks omitted). *See also Providence Baptist Church v. Hillandale Comm., Ltd.*, 425 F.3d 309, 317 (6th Cir. 2005). Moreover, as discussed more fully below, Rule 24(a)(2) is designed to give the district courts

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[4] The Sixth Circuit also noted that another panel of that Court had recently reached the same conclusion in a nearly identical case. *See Northland*, 487 F.3d at 345 (affirming denial of intervention to the sponsor of a citizen-initiative process resulting in enactment of Michigan's Legal Birth Definition Act, holding that the organization's "legal interest can be said to be limited to the passage of the Act rather than the state's subsequent implementation and enforcement of it.") This Court denied a petition for *certiorari* by the proposed intervenor in that case on January 7, 2008. *Standing Together to Oppose Partial-Birth-Abortion v. Northland Family Planning Clinic, Inc.*, 128 S. Ct. 872 (2008).

flexibility and discretion in addressing the "factbound" question of which persons or entities are appropriately situated to participate in any particular litigation. *See Izumi*, 510 U.S. at 34. That question is as germane to a constitutional challenge to a ballot-enacted measure as it is to any other form of litigation.

II. Petitioners' Proposed *Per Se* Rule Would Conflate the Elements of the Rule 24(a)(2) Analysis, Ignore the Reality that State Governments Can Competently Defend Their Own Laws, and Eviscerate the Discretion of the District Courts.

As Petitioners openly concede, their theory for why this Court should grant review rests upon a conflation of at least two of the four well-established elements of the intervention analysis under Rule 24(a)(2). *See* Pet. at 24 (insisting that "the adequacy with which Petitioners' interests will be represented effectively determines the substantiality of those interests"). As noted above, a movant must establish four elements to intervene as of right: (1) timeliness; (2) cognizable legal interest; (3) potential impairment of that interest; and (4) inadequacy of representation by those already parties. *See infra* Part I.

Petitioners, however, contend that ballot initiative sponsors *always* have a legally cognizable interest in litigation challenging enactments they have supported because the government can *never* be trusted to enforce and defend such laws itself. Thus, by conflating the "interest" and "adequacy" elements of the intervention analysis, Petitioners' rule would eliminate the "factbound" inquiry contemplated by

Rule 24(a)(2).[5] *See Izumi*, 510 U.S. at 33-34. This represents both a radical and unsupported departure from the Federal Rules of Civil Procedure and a disparagement of public servants who, like Attorney General Cox, competently and zealously defend the laws as they are sworn to do.

The Attorney General intervened in this litigation with the express purpose of ensuring a "vigorous defense" of Proposal 2. Cox Mot. to Intervene, at 5, 7, 11.[6] As "the state's chief law enforcement officer", the Attorney General "has not only a duty to ensure that the laws of the State are followed, but also a duty to defend those laws as enacted . . . by the People of Michigan themselves, when those laws are challenged". *Id.* at 13-14. *See also* Mich. Comp. Laws § 14.28.

And Attorney General Cox has steadfastly fulfilled that role. From his first appearance in this litigation, the Attorney General has actively defended Proposal 2. He contested nearly 90% of Plaintiffs' Joint Proposed Stipulation Of Facts,

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[5] Petitioners' *amicus* Mountain States Legal Foundation would apparently have the Court abrogate the four-factor test (and hence Rule 24(a)(2)) altogether, in favor of a "bright line rule that an initiative's sponsors may, as a matter of right, intervene in litigation challenging the constitutionality of their [sic] enactment". *Amicus Curiae* Brief of Mountain States Legal Foundation In Support of Petitioners at 10. That self-serving suggestion, of course, could not be implemented without amending Federal Rule 24 and overturning decades of well-reasoned precedent.

[6] A copy of the Attorney General's Motion to Intervene is appended hereto.

opposed both the Cantrell and Coalition Plaintiffs' motions for class certification, and actively participated in discovery. Moreover, the Attorney General's representatives have briefed, argued and now *won* a motion for summary judgment as to all claims presented by both sets of plaintiffs. *Coalition to Defend Affirmative Action v. Granholm*, 539 F. Supp. 2d 924 (2008). It is beyond legitimate dispute that Attorney General Cox has zealously represented the interests of all those who support Proposal 2 – including Petitioners – and there is every reason to believe that he will continue to do so in the event that further proceedings take place in the district court or in the Sixth Circuit.[7] Moreover, petitioners have not identified, even at this late stage, a single factual assertion or legal argument omitted by the

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[7] Michigan Governor Jennifer Granholm, who was initially named as a defendant, has been critical of Proposal 2. However, the Governor has never taken an active role in the litigation, and was voluntarily dismissed from the action on September 5, 2007 in light of the Attorney General's intervention. Petitioners also make much of a temporary (and extremely short-lived) stipulated injunction entered by the district court in the first weeks of the litigation. Pet. at 7, 23-24. However, the practical and logistical considerations that motivated the Attorney General to agree to that stipulation do not undermine his ability to defend Proposal 2. *See Northwest Forest Resource Council v. Glickman*, 82 F.3d 825, 838 (9th Cir. 1996) (holding that disagreement between a current party and proposed intervenor over whether the district court should enter a permanent injunction was "not central to [the] declaratory judgment action" and "only a difference in strategy" too "minor" to raise an inference of inadequate representation); *Jenkins v. Missouri*, 78 F.3d 1270, 1275 (8th Cir. 1996) ("A difference of opinion concerning litigation strategy . . . does not overcome the presumption of adequate representation.").

Attorney General that they would have proffered in the course of this litigation.

The *per se* rule advocated by Petitioners is as unworkable in practical terms as it is inconsistent with the reality that state governments can – and as in this case, frequently do – mount a robust defense of legislation enacted through an initiative process. To begin with, Petitioners do not identify *which* supporters of a ballot initiative should in their view have a *per se* right to intervene such litigation. Petitioner ACRF, for instance, is an out-of-state, nationwide organization devoted to the elimination of affirmative action across the nation. It is not an official ballot-question committee. A presumption that such organizations are entitled to intervene would constitute a blanket license for virtually any advocacy group to inject itself into litigation addressing ballot-enacted legislation of concern to them.

By contrast, a principal virtue of the four-part test under Rule 24(a)(2) is the flexibility it affords the district courts to control the identity and number of the parties before them. *See Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 526 & n.2 (9th Cir. 1983) (allowing intervention by the national office and five local chapters of the National Audubon Society, five Idaho non-profit environmental organizations and four individual residents partly on the basis that "[t]hroughout these proceedings intervenors have asserted a unitary interest and spoken with one voice" and cautioning that "[n]othing in this opinion should be interpreted as approving participation by

the intervenors on any other basis").[8] Petitioners would propose to strip the district courts of that discretion with respect to such groups.

Indeed, a *per se* federal rule purporting to delineate the categories of initiative supporters entitled to intervene is impossible because each state that permits legislation through referendum has its own set of procedures for placing issues on the ballot. Michigan law, in fact, provides for *two* such procedures – each of which contemplates different roles for sponsors, citizens, and the legislature. Mich. Const. Art. 2, § 9. Moreover, Petitioners and their *amici* appear to advocate for a *perpetual* right to intervene – *i.e.* no matter how great the lapse of time between a measure's enactment and the initiation of litigation challenging it.

The fatal complexity of any effort to deploy Petitioners' proposal in practice is matched only by the absurdity of Petitioners' premise that every

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[8] Moreover, the very evil that Petitioners purportedly seek to remedy – conflicted and/or inadequate defense of popularly-enacted legislation – is already expressly envisioned and protected against by the current, well-settled rule. *See Sagebrush Rebellion*, 713 F.2d at 528-29 (approving intervention as defendant by advocacy group where legitimate concern existed about the likelihood of zealous advocacy by a government defendant who had been director of the legal foundation representing the plaintiff prior to his appointment as Secretary of the Interior); *compare League of Latin American Citizens v. Wilson*, 131 F.3d 1297, 1305-07 (9th Cir. 1997) (distinguishing *Sagebrush Rebellion* and noting that then-California Governor Pete Wilson – a staunch advocate of the ballot-measure there at issue – was well-qualified to supervise its constitutional defense).

member of every state's government is categorically unable to defend *any piece of ballot-enacted legislation*. This Court should reject Petitioners' invitation to discard the fundamental presumption that elected government officials can, at least in many instances, both defend and enforce the laws of their states.

III. The "Direct and Dramatic" Inter-Circuit Conflict Petitioners Claim to Identify Does Not Exist.

For all their efforts to manufacture a "direct and dramatic [inter-Circuit] conflict . . . of major national significance", Pet. at 17, Petitioners manage to cite only a single Ninth Circuit opinion holding that a ballot-initiative sponsor was entitled to intervene as of right in post-enactment litigation challenging a measure it had supported.[9] That opinion,

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[9] In an effort to imply that the Sixth Circuit's own law is somehow unsettled, Petitioners suggest that *Northland* and the opinion below depart from *Mich. State AFL-CIO v. Miller*, 103 F.3d 1240 (6th Cir. 1997). As both the courts below recognized, no such conflict exists. In *Miller*, the Sixth Circuit allowed the Michigan Chamber of Commerce to intervene in litigation challenging newly-enacted state campaign finance laws. But as the Sixth Circuit has now repeatedly explained, *Miller* is distinguishable because the intervening party was "an entity also regulated by at least three of the four statutory provisions challenged" in the litigation. *Id.* at 1247. *See also Northland*, 487 F.3d at 345 (pointing out that pro-life advocacy organization that had sponsored citizen-initiative process, unlike the Chamber of Commerce in *Miller*, was "not itself regulated by any of the statutory provisions at issue here"); *see also Coalition*, 501 F.3d 782. The district court distinguished *Miller* on the same grounds. *Coalition*, 240 F.R.D. at 375.

Washington State Building & Construction Trades Council v. Spellman, 684 F.2d 627 (9th Cir. 1982), contains virtually no discussion of the rule it announces – which was arguably *dicta* in any event, since the same opinion simultaneously affirmed a judgment on the merits identical to that sought by the putative intervenors. *Spellman*'s entire "analysis" of this issue is as follows:

> "Denial of [the initiative sponsor's] motion to intervene was error and accordingly we reverse as to that holding. Rule 24 traditionally has received a liberal construction in favor of applicants for intervention. 7A C. Wright & A. Miller, Federal Practice and Procedure § 1904 (1972). [T]he public interest group that sponsored the initiative[] was entitled to intervention as a matter of right under Rule 24(a). However, while we sustain [the proposed intervenor's] appeal, this reversal does not require a new trial because the holding of the case would not be changed."

Id. at 629-30. The opinion contains no other discussion of the intervention issue.

Petitioners' other cases from the Ninth Circuit do not concern intervention by ballot-initiative sponsors and therefore are inapposite. *See Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489 (9th Cir. 1995) (allowing intervention by state and county in suit to enjoin implementation of certain logging regulations); *Sagebrush Rebellion* 713 F.2d at 525 (allowing intervention by Audubon Society and certain other entities in challenge to

regulatory action by the Department of the Interior); *Idaho v. Freeman*, 625 F.2d 886 (9th Cir. 1980) (allowing intervention by women's rights organization in legal challenge to procedures for ratifying the Equal Rights Amendment). Notably, *Forest Conservation Council*, *Sagebrush Rebellion* and *Freeman* all involved challenges to rulemaking or ratification *procedures* – none involved a challenge to the validity of a law or regulation as enacted. *Id.*

In fact, other cases from the Ninth Circuit – not cited in the petition – *deny* intervention to initiative sponsors in Petitioners' circumstances, consistent with the result below. *Wilson*, 131 F.3d at 1297 (affirming denial of intervention by sponsors of initiative intended to deny government benefits to undocumented immigrants); *see also Prete*, 438 F.3d at 959-60 (holding that grant of intervention to sponsor and supporter of Oregon ballot initiative was erroneous but, under the circumstances, harmless). The present action is plainly an inappropriate vehicle for resolution of any inconsistency within Ninth Circuit caselaw. *See Wisniewski v. United States*, 353 U.S. 901, 902 (1957) (per curiam) (holding that "doubt about the respect to be accorded to a previous decision of a different panel [of the same Court of Appeals] should not be the occasion" for a writ of *certiorari*).

CONCLUSION

For all of the foregoing reasons, the petition should be denied.

June 11, 2008

Respectfully Submitted,

/S/ Mark D. Rosenbaum

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APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRANT RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY (BAMN), UNITED FOR EQUALITY AND AFFIRMATIVE ACTION LEGAL DEFENSE FUND, RAINBOW PUSH COALITION, CALVIN JEVON COCHRAN, LASHELLE BENJAMIN, BEAUTIE MITCHELL, DENESHA RICHEY, STASIA BROWN, MICHAEL GIBSON, CHRISTOPHER SUTTON, LAQUAY JOHNSON, TURQOISE WISE-KING, BRANDON FLANNIGAN, JOSIE HUMAN, ISSAMAR CAMACHO, KAHLEIF HENRY, SHANAE TATUM, MARICRUZ LOPEZ, ALEJANDRA CRUZ, ADARENE HOAG, CANDICE YOUNG, TRISTAN TAYLOR, WILLIAMS FRAZIER, JERRELL ERVES, MATTHEW GRIFFITH, LACRISSA BEVERLY, D'SHAWNM FEATHERSTONE, DANIELLE NELSON, JULIUS CARTER, KEVIN SMITH, KYLE SMITH, PARIS BUTLER, TOUISSANT KING, AIANA SCOTT, ALLEN VONOU, RANDIAH GREEN, BRITTANY JONES, COURTNEY DRAKE, DANTE DIXON, JOSEPH HENRY RED, AFSCME LOCAL 207, AFSCME LOCAL 214, AFSCME LOCAL 312, AFSCME LOCAL 836, AFSCME LOCAL 1642, AFSCME LOCAL 2920, and the DEFEND AFFIRMATIVE ACTION PARTY,

vs.

JENNIFER GRANHOLM, in her official capacity as Governor of the State of Michigan, the REGENTS OF THE UNIVERSITY OF MICHIGAN, the BOARD OF TRUSTEES OF MICHIGAN STATE UNIVERSITY, the BOARD OF GOVERNORS OF WAYNE STATE UNIVERSITY, and the TRUSTEES OF any other public college or university, community college, or school district,

Defendants

and

The REGENTS OF THE UNIVERSITY OF MICHIGAN, the BOARD OF TRUSTEES OF MICHIGAN STATE UNIVERSITY and the BOARD

Case No. 2:06-CV-15024

Hon. David M. Lawson

OF GOVERNORS OF WAYNE STATE UNIVERSITY,

Cross-Plaintiffs

vs.

JENNIFER GRANHOLM, in her official capacity as Governor of the State of Michigan,

Cross-Defendant.

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ATTORNEY GENERAL MICHAEL A. COX'S MOTION TO INTERVENE AS A DEFENDANT IN THE COMPLAINT FILED BY PLAINTIFFS, AND IN THE CROSS CLAIM FILED BY THE DEFENDANT UNIVERSITIES

NOW COMES Attorney General Michael A. Cox, by his attorneys, Margaret A. Nelson, Heather S. Meingast, and Joseph E. Potchen, Assistant Attorneys General, and in support of his motion to intervene states as follows:

1. On November 8, 2006, Plaintiffs filed with this Court a complaint for injunctive and declaratory relief raising a facial challenge to newly adopted art 1, § 26 of the Michigan Constitution, better known as Proposal 2. The complaint alleges equal protection and First Amendment challenges under the federal constitution. The complaint also asserts that § 26 is preempted by the Civil Rights Act of 1866, Titles VI and VII and, the Civil Rights Act of 1964, and Title XI of the education Amendments of 1972. Plaintiffs request that this Court declare § 26 unconstitutional under the First Amendment and the Equal Protection Clause of the Fourteenth Amendment and permanently enjoin defendants from eliminating any affirmative action plans and granting any other relief it determines appropriate.

2. The complaint names as defendants Governor Jennifer Granholm, in her official capacity, the Regents of the University of Michigan, the Michigan State University Board of Trustees, and the Wayne State University Board of Governors.

3. Although Plaintiffs filed their suit the day after the election, they did not serve the Governor until December 8, 2006.

4. The Defendant Universities then filed their cross claim on December 11, 2006. The cross claim asserts a violation of the Universities' alleged First Amendment right of academic freedom to admit a class that best meets their academic goals during the current admissions cycle if the Universities are required to implement § 26 upon the section's effective date – 12:01 a.m. December 23, 2007.[1]

5. The Universities assert they have already begun both their admissions and financial aid cycles, with some decisions being made prior to the passage of § 26. They allege that to implement § 26 now, in the middle of that cycle, would require them to apply different polices to applicants within the same cycle and different polices than they have announced as

[1] See Const 1963, art 12, § 2 providing for the effective date of § 26.

applicable to this cycle. The Universities also allege that the amendment's exceptions applicable to federal programs, federal law, and the federal constitution apply to their admissions policy and effectively exempt them from the amendment's provisions.

6. The Universities request a judgment declaring that under federal law the Universities may continue to use their existing admissions and financial aid policies through the end of the current cycle, and otherwise declaring their rights and responsibilities under the Amendment in light of federal law.

7. The Universities also filed a motion for preliminary injunction and requested an expedited hearing in the matter. The Universities seek a preliminary injunction enjoining the application of § 26 to preserve the status quo and allow the Universities to continue to use their existing admissions and financial aid policies through the end of the current cycle or until the Court enters its declaratory judgment. Alternatively, if the Court cannot rule by December 22, 2006, the Universities ask this Court to enter a temporary restraining order pending a ruling on the preliminary injunction.

8. On December 11, 2006, Governor Granholm formally requested that the Attorney General provide her with legal representation in this suit as provided for by the state constitution and statutes.[2] Recognizing a potential legal conflict because of the differing political positions taken by the Governor and the Attorney General on Proposal 2, now Const 1963, art 1, § 26, Governor Granholm requested the creation of a conflict wall to assure the independence of her assigned legal team. (See Exhibit 1) Governor Granholm also indicated she will not oppose the Attorney General's intervention in this matter.

[2] See Const 1963, art 5, §§ 3, 21; MCL 14.28.

9. In acknowledgement of a legal conflict, and pursuant to the Governor's request, the Attorney General has assigned an independent team of Assistant Attorneys General and established a conflict wall.

10. These unique circumstances, however, compel the Attorney General to seek leave to intervene in both the complaint and cross claim filed in this matter in order to ensure that the Court is presented with the full range of arguments on the questions presented, and so that a vigorous defense of the constitutionality of § 26 may be had.

11. Federal Rule of Civil Procedure 24, states:

> (a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: . . . (2) *when the applicant claims an interest relating to the . . . transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.*
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> (b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: . . . (2) *when an applicant's claim or defense and the main action have a question of law or fact in common.* When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties. [Emphasis added.]

12. Again the Attorney General, as the state's chief law enforcement officer, has not only a duty to ensure that the laws of the State are followed, but also a duty to defend those laws as enacted by the Legislature, or as in this case by the People of Michigan themselves, when

those laws are challenged.[3] Concomitant with those duties is the Attorney General's right under Michigan law to intervene in any matter to protect state interests.[4]

13. The Attorney General thus has a substantial legal interest in this matter relating to his duty to defend the constitutionality of § 26 on behalf of the State of Michigan, which interest will not be adequately represented through Governor Granholm's participation in this suit.

14. The United States Court of Appeals for the Sixth Circuit recognized in *Associated Builders & Contrs, Saginaw Valley Area Chapter v Perry* that the Attorney General has broad authority to intervene in matters affecting the public's interests, and that he should only be prohibited from doing so when it would prove inimical to the public interest.[5] In that case, the Sixth Circuit determined that then Attorney General Frank Kelley should have been allowed to intervene as of right and appeal a district court decision that held a state statute preempted by federal law where the defendant Director of the Department of Labor and Governor did not appeal, but rather "permitted the thirty-year-old [statute] to go to its demise without fully exercising their right to object."[6] The Court concluded that the State's interests were not adequately represented by the decision not to appeal because substantial questions of law existed as to whether the state statute was in fact preempted by federal law, and that these circumstances warranted the Attorney General's intervention and appeal in the matter.[7]

15. The circumstances here are analogous to those presented in *Associated Builders* and support the Attorney General's intervention. While this case does not yet involve an appeal

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[3] Const 1963, art 5, §§ 3, 21; MCL 14.28.
[4] See MCL 14.101 See also *Attorney General v Public Service Comm*, 243 Mich App 487, 496-497; 625 NW2d 16 (2000).
[5] *Associated Builders & Contrs., Saginaw Valley Area Chapter v Perry*, 115 F3d 386, 390 (CA 6, 1997).
[6] *Associated Builders*, 115 F3d at 390.
[7] *Associated Builders*, 115 F3d at 390-392.

and Governor Granholm remains an active party to the suit, it is clear that the State's interests as a whole will not be adequately represented through the Governor's participation.

16. The Attorney General should thus be allowed to intervene as a matter of right in this case under FR Civ P 24(a) to ensure that the State's interests are adequately presented via a vigorous defense of the constitutionality of § 26.

17. Alternatively, the Attorney General should be permitted to intervene under FR Civ P 24(b) because his defense of § 26 – that it withstands constitutional scrutiny under the First Amendment and the Fourteenth Amendment – will have questions of fact or law in common with the main action and original parties as required by the rule. His motion is timely and permitting the Attorney General's intervention will in no way unduly delay or prejudice the adjudication of the rights of the original parties since this suit is still in its initial phase. Accordingly, intervention should be granted in accordance with FR Civ P 24(b).

18. Under LR 7.1(a), Attorney General Cox has sought concurrence in the motion to intervene from all counsel to the parties in this action. The Governor does not oppose the Attorney General's intervention. Counsel for the Universities was unable to respond before speaking with his clients. Counsel for the Plaintiffs does not oppose the Attorney General's intervention.

WHEREFORE, for the reasons set forth above and in the accompanying brief, Attorney General Michael A. Cox requests that this Court grant his Motion to Intervene pursuant to Fed R Civ P 24(a) and (b).

ATTORNEY GENERAL MICHAEL A. COX'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO INTERVENE IN THE COMPLAINT FILED BY PLAINTIFFS, AND IN THE CROSS CLAIM FILED BY THE DEFENDANT UNIVERSITIES

CONCISE STATEMENT OF ISSUE PRESENTED

Federal Rule of Civil Procedure 24 accords persons the opportunity to intervene in a matter either as of right or by permission. Here, the Attorney General has a substantial legal interest in the matters presented to this Court in the complaint and cross claim, which challenge the constitutionality of Const 1963, art 1, § 26 and which interest will not be adequately represented through Governor Granholm's participation in the suit thus warranting his intervention as of right. Alternatively, the Attorney General should be permitted to intervene because his defense of § 26 – that it withstands constitutional scrutiny under the First Amendment and the Fourteenth Amendment – will have questions of fact or law in common with the main action and original parties. Should this Court therefore exercise its discretion and allow the Attorney General to intervene either as of right or by permission in the underlying complaint and cross claim?

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Associated Builders & Contrs., Saginaw Valley Area Chapter v Perry, 115 F3d 386 (CA 6, 1997)

Attorney General v Public Service Comm, 243 Mich App 487, 496-497; 625 NW2d 16 (2000)

Jordan v Michigan Conference of Teamsters Welfare Fund, 207 F3d 854, 863 (CA 6, 2000)

Linton v Commissioner of Health & Env't, 973 F2d 1311, 1319 (CA 6, 1992)

Michigan State v Miller, 103 F3d 1240, 1248 (CA 6, 1997)

Michigan State AFL-CIO v Miller, 103 F3d 1240, 1245 (CA 6, 1997)

Providence Baptist Church v Hillandale Comm, Ltd., 425 F3d 309, 313 (CA 6, 2005)

Stupak-Thrall v Glickman, 226 F3d 467, 471 (CA 6, 2000)

United States v Michigan, 424 F3d 438, 443-444 (CA 6, 2005)

STATEMENT OF THE FACTS

On November 8, 2006, Plaintiffs filed with this Court a complaint for injunctive and declaratory relief raising a facial challenge to newly adopted art 1, § 26 of the Michigan Constitution, better known as Proposal 2.[8] The complaint alleges equal protection and First Amendment challenges under the federal constitution. The complaint also asserts that § 26 is preempted by the Civil Rights Act of 1866, Titles VI and VII and, the Civil Rights Act of 1964, and Title XI of the education Amendments of 1972. Plaintiffs request that this Court declare § 26 unconstitutional under the First Amendment and the Equal Protection Clause of the Fourteenth Amendment and permanently enjoin defendants from eliminating any affirmative action plans and granting any other relief it determines appropriate. The complaint names as defendants Governor Jennifer Granholm, in her official capacity, the Regents of the University of Michigan, the Michigan State University Board of Trustees, and the Wayne State University Board of Governors. Although Plaintiffs filed their suit the day after the election, they did not serve the Governor until December 8, 2006.

On December 11, 2006, the defendant Universities filed a cross claim with this Court against defendant Governor Granholm seeking declaratory and injunctive relief. The cross claim asserts a violation of the Universities' alleged First Amendment right of academic freedom to admit a class that best meets their academic goals during the current admissions cycle if the Universities are required to implement § 26 upon the section's effective date – 12:01 a.m. December 23, 2007.[9] The Universities assert they have already begun both their admissions and

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[8] The amendment passed overwhelmingly on November 7, 2006, with 2,141,010 citizens voting in favor of the proposal, and 1,555,691 citizens voting against the proposal, or by 57.9 % to 42.1%. See http://mihoec.fr.nictusa.com/election/results/06GEN/90000002.html.

[9] See Const 1963, art 12, § 2 providing for the effective date of § 26.

financial aid cycles, with some decisions being made prior to the passage of § 26. They allege that to implement § 26 now, in the middle of that cycle, would require them to apply different polices to applicants within the same cycle and different polices than they have announced as applicable to this cycle. The Universities also allege that the amendment's exceptions applicable to federal programs, federal law, and the federal constitution apply to their admissions policy and effectively exempt them from the amendment's provisions. The Universities request a judgment declaring that under federal law the Universities may continue to use their existing admissions and financial aid policies through the end of the current cycle, and otherwise declaring their rights and responsibilities under the Amendment in light of federal law.

The Universities also filed a motion for preliminary injunction and requested an expedited hearing in the matter. The Universities seek a preliminary injunction enjoining the application of § 26 to preserve the status quo and allow the Universities to continue to use their existing admissions and financial aid policies through the end of the current cycle or until the Court enters its declaratory judgment. Alternatively, if the Court cannot rule by December 22, 2006, the Universities ask this Court to enter a temporary restraining order pending a ruling on the preliminary injunction.

On December 11, 2006, Governor Granholm formally requested that the Attorney General provide her with legal representation in this suit as provided for by the state constitution and statutes.[10] Recognizing a potential legal conflict because of the differing political positions taken by the Governor and the Attorney General on Proposal 2, now art 1, § 26, Governor Granholm requested the creation of a conflict wall to assure the independence of her assigned

[10] See Const 1963, art 5, §§ 3, 21; MCL 14.28.

legal team. Governor Granholm also indicated she will not oppose the Attorney General's intervention in this matter.

In acknowledgement of the legal conflict, and pursuant to the Governor's request, the Attorney General has assigned an independent team of Assistant Attorneys General and established a conflict wall.

These unique circumstances, however, compel the Attorney General to seek leave to intervene in both the complaint and cross claim filed in this matter in order to ensure that the Court is presented with the full range of arguments on the questions presented, and so that a vigorous defense of the constitutionality of § 26 may be had.

ARGUMENT

Federal Rule of Civil Procedure 24 accords persons the opportunity to intervene in a matter either as of right or by permission. Here, the Attorney General has a substantial legal interest in the matters presented to this Court in the complaint and cross claim, which challenge the constitutionality of Const 1963, art 1, § 26 and which interest will not be adequately represented through Governor Granholm's participation in the suit thus warranting his intervention as of right. Alternatively, the Attorney General should be permitted to intervene because his defense of § 26 – that it withstands constitutional scrutiny under the First Amendment and the Fourteenth Amendment – will have questions of fact or law in common with the main action and original parties. This Court should therefore exercise its discretion and allow the Attorney General to intervene either as of right or by permission in the underlying complaint and cross claim.

A. Standard of Review

The decision whether to grant a motion to intervene lies within the discretion of the district court.[11]

B. The Attorney General should be allowed to intervene as of right under FR Civ 24(a).

Federal Rule of Civil Procedure 24, states:

> (a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the applicant claims an interest relating to the . . . transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Four criteria must be met for intervention as a matter of right: (1) the application is timely; (2) the party must have a substantial legal interest in the case; (3) the party must demonstrate that its ability to protect that interest will be impaired in the absence of intervention; and (4) there must be inadequate representation of that interest by the current party.[12] If any of

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[11] *Providence Baptist Church v Hillandale Comm, Ltd.*, 425 F3d 309, 313 (CA 6, 2005).
[12] See *Michigan State AFL-CIO v Miller*, 103 F3d 1240, 1245 (CA 6, 1997).

these criteria are not satisfied, a motion to intervene must be denied.[13] The Sixth Circuit has adopted a "rather expansive notion of the interest sufficient to invoke intervention."[14]

A proposed intervenor's burden in showing inadequate representation of its interests is minimal.[15] A showing of possible inadequate representation is sufficient to meet such burden.[16] Despite such a minimal burden, "applicants for intervention must overcome the presumption of adequate representation that arises when they share the same ultimate objective as a party to the suit."[17] The Sixth Circuit has adopted a three-part test to determine if the existing parties adequately represent the interests of a proposed intervenor.[18] The Sixth Circuit has held that a movant fails to meet his burden of demonstrating inadequate representation when (1) no collusion is shown between the existing party and the opposition; (2) the existing party does not have any interests adverse to the intervenor; and (3) the existing party has not failed in the fulfillment of its duty.[19]

In reviewing these factors, it is apparent that the Attorney General's motion to intervene is timely filed as the present lawsuit is in its initial phase. Moreover, the Attorney General has a substantial legal interest in this matter that will not be adequately represented by the existing parties. The Attorney General, as the state's chief law enforcement officer, has not only a duty to ensure that the laws of the State are followed, but also a duty to defend those laws as enacted by the Legislature, or as in this case by the People of Michigan themselves, when those laws are

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[13] *Stupak-Thrall v Glickman*, 226 F3d 467, 471 (CA 6, 2000).
[14] *Michigan State AFL-CIO*, 103 F3d at 1245.
[15] *Linton v Commissioner of Health & Env't*, 973 F2d 1311, 1319 (CA 6, 1992).
[16] *Linton*, 973 F2d at 1319.
[17] *United States v. Michigan*, 424 F3d 438, 443-444 (CA 6, 2005).
[18] *Jordan v Michigan Conference of Teamsters Welfare Fund*, 207 F3d 854, 863 (CA 6, 2000).
[19] *Jordan*, 207 F3d at 863.

challenged.[20] Concomitant with those duties is the Attorney General's right under Michigan law to intervene in any matter to protect state interests.[21] The Attorney General thus has a substantial legal interest in this matter relating to his duty to defend the constitutionality of § 26 on behalf of the State of Michigan, which interest will not be adequately represented through Governor Granholm's participation in this suit.

In *Associated Builders & Contrs, Saginaw Valley Area Chapter v Perry* the United States Court of Appeals for the Sixth Circuit recognized the Attorney General's broad authority and duty to represent the interests of the State [22]:

> In *Michigan ex rel. Kelley v CR Equipment Sales, Inc*, 898 F Supp 509, 513-14 (WD Mich 1995), District Judge Benjamin Gibson, discussing the same Attorney General involved in the instant case, said:
>
> "Michigan's Attorney General has broad authority to prosecute actions when to do so is in the interest of the state. First, Michigan statutory law provides as follows:
>
> The attorney general shall prosecute and defend all actions in the supreme court, in which the state shall be interested, or a party ... and may, when in his own judgment the interests of the state require it, intervene in and appear for the people of this state in any other court or tribunal, in any cause or matter, civil or criminal, in which the people of this state may be a party or interested. Mich. Comp. Laws Ann. § 14.28 (West 1994). In addition, 'the attorney general has a wide range of powers at common law.' *Mundy v McDonald*, 216 Mich 444, 450; 185 NW 877 (1921). Thus, the Attorney General 'has statutory and common law authority to act on behalf of the people of the State of Michigan in any cause or matter, such authority being liberally construed.' *Michigan State Chiropractic Ass'n v Kelley*, 79 Mich App 789; 262 NW2d 676, 677 (1977)(citations omitted); see also *Mundy*, 216 Mich at 450, 185 NW 877 (Attorney General has broad discretion 'in determining what matters may, or may not, be of interest to the people generally.').
>
> The Court should only prohibit the Attorney General from intervening or bringing an action when to do so 'is clearly inimical to the public interest.' *In re*

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[20] Const 1963, art 5, §§ 3, 21; MCL 14.28.

[21] See MCL 14.101 See also *Attorney General v Public Service Comm*, 243 Mich App 487, 496-497; 625 NW2d 16 (2000).

[22] *Associated Builders & Contrs., Saginaw Valley Area Chapter v Perry*, 115 F3d 386, 390 (CA 6, 1997).

> *Intervention of Attorney Gen.*, 326 Mich 213; 40 NW2d 124, 126 (1949) (citation omitted); see also *Michigan State Chiropractic Ass'n*, 262 NW2d at 677. Although a procedural distinction exists between intervention and initiating an action, 'there is merger of purpose, by reason of public policy, when the interests of the State call for action by its chief law officer and there is no express legislative restriction to the contrary.' *In re Lewis' Estate*, 287 Mich. 179, 184, 283 N.W. 21 (1938)." See also *Humphrey v Kleinhardt*, 157 FRD 404, 405 (WD Mich 1994).

In that case, the Sixth Circuit determined that then Attorney General Frank Kelley should have been allowed to intervene as of right and appeal a district court decision that held a state statute preempted by federal law where the defendant Director of the Department of Labor and Governor did not appeal, but rather "permitted the thirty-year-old [statute] to go to its demise without fully exercising their right to object."[23] The Court concluded that the state's interests were not adequately represented by the decision not to appeal because substantial questions of law existed as to whether the state statute was in fact preempted by federal law, and that these circumstances warranted the Attorney General's intervention and appeal in the matter[24]:

> The existence of a substantial unsettled question of law is a proper circumstance for allowing intervention and appeal. Where such uncertainty exists, one whose interests have been affected adversely by a district court's decision should be entitled to "receive the protection of appellate review." A failure to seek such protection may constitute inadequate representation warranting intervention. "Although diligent prosecution may not require an appeal in every case . . . appeal . . . should be liberally granted where the judgment of the trial court raises substantial and important questions of law in relation to its correctness."
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> * * *
>
> [The Attorney General's] burden of demonstrating inadequacy of representation was minimal, not heavy. Unlike the questionable status of the Electrical Contractors' Association in *Perry I*, [the Attorney General], representing the State of Michigan, has standing to argue the question of ERISA preemption of a state statute.

The circumstances here are analogous to those presented in *Associated Builders* and support the Attorney General's intervention. While this case does not yet involve an appeal and Governor

[23] *Associated Builders*, 115 F3d at 390.
[24] *Associated Builders*, 115 F3d at 390-392.

Granholm remains an active party to the suit. it is clear that the State's interests as a whole will not be adequately represented through the Governor's participation given the conflict in legal positions. Although there is no apparent collusion between the Governor and the plaintiffs or the Universities as cross plaintiffs, it is expected that the Governor's legal position will more closely align with the positions asserted by the plaintiffs and cross plaintiffs in this case. Under these circumstances, the Attorney General has met his minimal burden of showing possible – if not probable – inadequate representation in the defense of the constitutionality of § 26 without his intervention. Indeed, Governor Granholm has acknowledged the conflict between the respective positions, and does not oppose the Attorney General's intervention. For these reasons, this Court should exercise its discretion and allow the Attorney General to intervene as of right.

C. **Alternatively, the Attorney General should be permitted to intervene under FR Civ 24(b).**

Federal Rule of Civil Procedure 24, states:

> b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: . . . (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the

Should this Court determine that the Attorney General is not entitled to intervene as of right, he asks that this Court permit him to intervene under FR Civ P 24(b). Again, the Attorney General's motion is timely since this lawsuit is in its infancy. In addition, the Attorney General's defense of § 26 – that it withstands constitutional scrutiny under the First Amendment and the Fourteenth Amendment – will have questions of fact or law in common with the main action and

original parties as required by the rule.[25] Finally, permitting the Attorney General's intervention will in no way unduly delay or prejudice the adjudication of the rights of the original parties since this suit is still in its initial phase and no substantive proceedings have taken place. Accordingly, the Attorney General should permitted to intervene in accordance with FR Civ P 24(b).

CONCLUSION AND RELIEF SOUGHT

For the reasons set forth above and in the accompanying motion, Attorney General Michael A. Cox respectfully requests that this Court exercise its discretion and grant his motion to intervene in the complaint and cross claim filed in this matter pursuant to either FR Civ P 24(a) or (b).

Respectfully submitted.

Michael A. Cox
Attorney General

s/Margaret A. Nelson
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Dated: December 14, 2006

[25] See, e.g. *Michigan State v Miller*, 103 F3d 1240, 1248 (CA 6, 1997), where the Sixth Circuit concluded that the Michigan Chamber of Commerce should have been permitted to intervene in a lawsuit challenging the constitutionality of state campaign finance laws because "[t]he Chamber's claim that the 1994 amendments are valid presents a question of law common to the main action."

CERTIFICATE OF SERVICE

I hereby certify that on December 14, 2006, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing of the following: **ATTORNEY GENERAL MICHAEL A. COX'S MOTION TO INTERVENE AS A DEFENDANT IN THE COMPLAINT FILED BY PLAINTIFFS, AND IN THE CROSS CLAIM FILED BY THE DEFENDANT UNIVERSITIES WITH BRIEF IN SUPPORT**

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